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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92055585
Party	Defendant Drew Massey DBA myUndies Inc.
Correspondence Address	DREW MASSEY DREW MASSEY DBA MYUNDIES INC 3387 XANTHIA STREET DENVER, CO 80238 UNITED STATES massey@masseyventures.com
Submission	Motion to Dismiss - Rule 12(b)
Filer's Name	Drew Massey
Filer's e-mail	dcmassey@aol.com
Signature	/Drew Massey/
Date	06/26/2013
Attachments	myUNDIES_Trademark_2013_RESPONSE.pdf(592560 bytes)

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the matter of Registration:
Registration No.: 3,688,473
Registered: September 29, 2009
Registrant: Drew Massey DBA myUndies Inc.
Mark: MYUNDIES

MEUNDIES, INC.,
Petitioner,
v.

DREW MASSEY DBA MYUNDIES INC.
Registrant.

RE: Cancellation No. 92055585

Trademark Trial and Appeal Board
U.S. Patent and Trademark Office
P.O. Box 1451
Alexandria, Virginia 22313-1451

REGISTRANT'S RESPONSE TO PETITIONER'S MOTION

AND REQUEST FOR IMMEDIATE DISMISSAL OF PETITION TO CANCEL

The Registrant again requests an immediate dismissal of the Petitioner's cancellation proceedings post haste. Pursuant to the legal requirement and basic definition of abandonment of at least three consecutive years of non-use, Petitioner has failed to make a valid claim as the registered mark is not abandoned and is in use. Registrant has the mark in use and has no intention of abandoning the mark. Additionally, Petitioner's amended petition lacks evidence and is based on "beliefs" that fail to rise above the speculative level. More importantly, the Petitioner's cancellation filing was less than 3 years after the Registration of the Registrant's mark. Therefore the petition to cancel is not legally sufficient and should be immediately dismissed.

Petitioner is attempting all efforts to fraudulently obtain Registrant's rightful and legally owned mark. Petitioner attempted to register an infringing mark just 2 years after the registration of Registrant's mark. USPTO rightfully denied Petitioner's attempt at stealing a valid mark and Petitioner is therefore using significant financial resources to attempt to intimidate and overwhelm rightful Registrant's ownership and use of said mark, while at the same time ignoring intellectual property rights by selling goods with an infringing label (**and**

now further harming mark by advertising on pornographic websites—see below). Petitioner's original counsel failed to complete a basic trademark search prior to attempting to register infringing mark. That counsel then provided false testimony under signed decree claiming a thorough investigation prior to filing an application for the infringing mark. And that counsel fabricated testimony with an employee of the Petitioner who contacted the Registrant under false pretenses after the USPTO denied Petitioner's application. Petitioner is purposely creating confusion and causing harm to legally owned registrant by the continued use of a similar mark and is now causing further harm to Registrant by making false allegations and causing duress on Registrant by filing a fraudulent cancellation petition. Registrant requests that the USPTO not unduly burden Registrant with 12-18 months of discovery and trial for an unfounded (yet well-financed) cancellation petition. Petitioner's cancellation request is lacking a valid abandonment claim and is based on fraud and should be dismissed immediately.

SPECIFIC DENIALS TO THE PETITIONER'S CLAIMS:

1. ADMIT. Although it is irrelevant, Petitioner claims it is a Corporation.
2. ADMIT. Although it is irrelevant, Petitioner claims Registrant is an individual.
3. ADMIT & DENY. Petitioner claims it selling a "wide variety of undergarments under the MEUNDIES" mark. Petitioner does not own a mark. Petitioner is selling a *very limited* number of products (3 types of underwear, one style sock and a t-shirt, no bras/tops for women) under an infringing label.
4. ADMIT. After the Petitioner's first application for an infringing mark was denied by the USPTO, the Petitioner did file a SECOND application for an infringing mark in 2012. It was also DENIED. Additionally, Petitioner abandoned a third infringing application.
5. ADMIT. Registrant is indeed the rightful and legal owner of the MYUNDIES trademark.
6. ADMIT. Registrant's trademark application that was approved in 2009, was submitted to USPTO in 2008.
7. ADMIT. BOTH Petitioner's applications that attempted to infringe on Registrant's trademark were refused by the USPTO. Additionally, Petitioner abandoned a third infringing application.
8. ADMIT. Petitioner believes all future applications filed by Petitioner will be refused based on confusion. Registrant agrees and requests that Petitioner merely change its name.

9. DENY. Petitioner has not been harmed. Petitioner is causing significant harm to Registrant by attempts to steal Registrant's legal trademark. And by its continual flagrant disregard of Trademark law with its continued development and commerce of goods with an infringing mark—all done with full-knowledge that it is causing harm. And by unduly burdening Registrant with 12 previous months of legal proceedings with another 12-18 months of proceedings to come.

10. DENY. Petitioner claims that Registrant does not sell good identified with the MYUNDIES trademark. Registrant has and continues to sell goods. Registrant has a website that sells goods and has a link from its Facebook and Twitter accounts to that commerce website. Additionally, Registrant had a store on Facebook, but the company Payvment that provided the backend "shopping mall" technology sold itself to Intuit (see *Wall Street Journal* story below) and closed its business, and deleted all of its merchant stores, in March 2013.



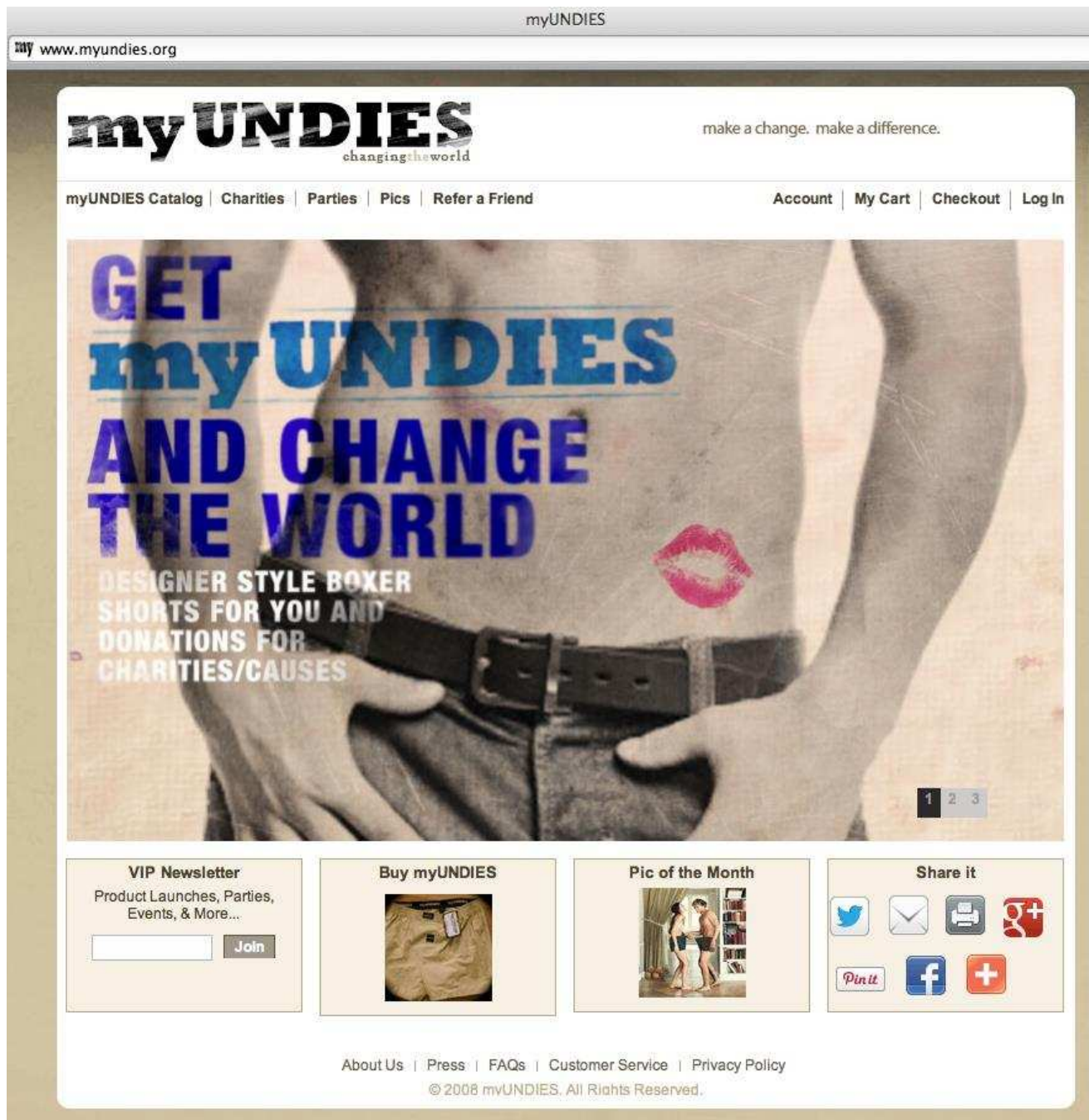
Intuit Confirms Purchase of Payvment After Shutting Down Its Commerce Platform

JANUARY 28, 2013 AT 2:03 PM PT

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Payvment [announced it was shutting down its Facebook commerce platform](#) last night and handing over its customers to Ecwid, and today Intuit confirmed it is acquiring at least some of its employees. In a statement, the financial software provider said: "Intuit has acquired a team of highly skilled developers who will be of great value to the social teams at Intuit." No other terms of the deal were disclosed. Meanwhile, Payvment's social commerce platform and companion shopping site, Lish.com, will close as of March 1.

Rather than partner with another online shopping store service that may close (another store platform named Vendorshop announced it is closing May 15, 2013), Registrant developed and built its own store that opened a few weeks later in April 2013 and is available at www.MYUNDIES.org:



11. DENY. Registrant has and does sell goods directly identified in the MYUNDIES Registration. While the Registrant is not as well-financed as the Petitioner, the Registrant has produced and sells product directly, on its own website (see above or go to www.MYUNDIES.org), as well as (previously) from a Facebook Payment shopping store. Besides launching the company during the height of the "Great Recession" with limited resources, **the Registrant has also been limited in its efforts to market and invest during the past 18**

months due to the infringing efforts of the Petitioner that have caused irreparable harm and directly affects the Registrant's ability to obtain additional resources and/or attract financing for further growth. Despite a historically bad economic market, and a well-financed Venture Capitalist attempting to steal Registrant's mark, the Registrant has never had three consecutive years of non-use. Additionally, once the Petitioner's petition is dismissed, and the Petitioner changes its infringing name, the Registrant will be able to secure resources to build the company quicker.

12. & 13. DENY. Petitioner claims product tag URL address and URL are not directing to Registrant's goods for sale. Registrant's product tag shows "www.freeMYUNDIES.com" which has and does resolve to the ecommerce store to purchase Registrant's product. Additionally, Registrant owns many URLs with the MYUNDIES trademark including MYUNDIES.ORG, MYUNDIES.INFO, GETMYUNDIES.COM, FREEMYUNDIES.COM, SHOPMYNDIES.COM, etc. And while strategic reasons are confidential, Registrant's marketing efforts include plans for leveraging several URLs (not unlike companies like bit.ly and de.licio.us). For example, Registrant's core consumer is aligned with social and charitable causes so the .org domain is important to the Registrant (like craigslist.org). The company has no legal requirement, nor intention to own every available domain extension. To that point, the Petitioner does not own every URL iteration of the infringing mark MEUNDIES. Currently, MEUNDIES.ORG and MEUNDIES.INFO as well as many more extensions are available for purchase.

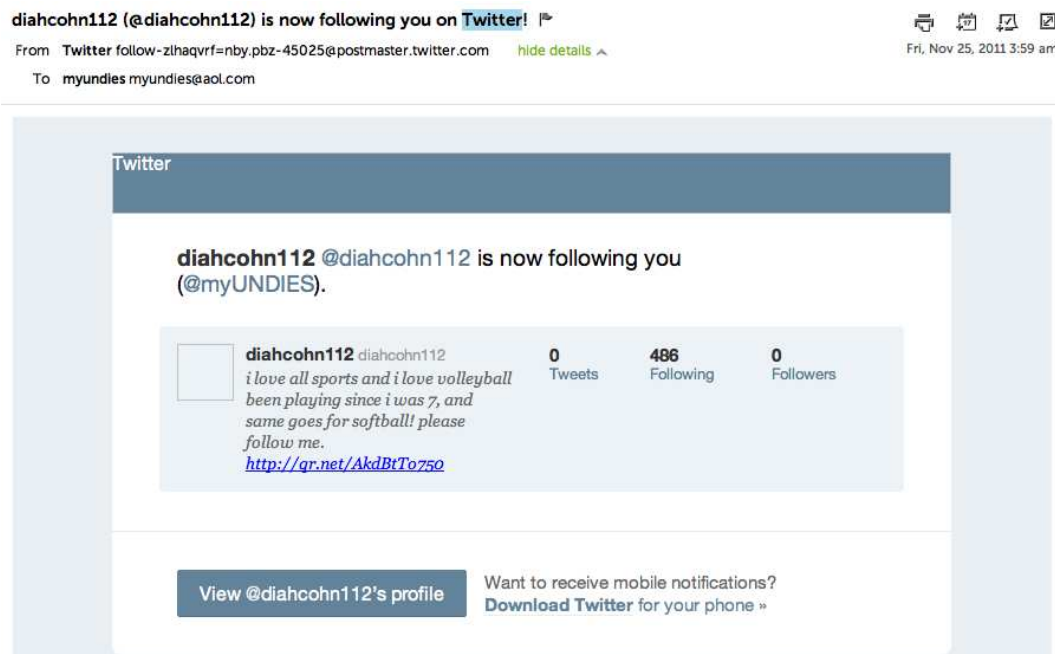
14. DENY. Registrant has had a presence on Facebook since 2009—earlier than the official approved USPTO Registration of Registrant's trademark. Before Facebook allowed wide use of corporate and brand pages, Registrant created a Facebook profile for Free MyUndies on May 16, 2009. The URL is www.facebook.com/myundeeds. The Registrant also created a MYUNDIES fan page before it was rolled into a business Facebook brand page which is now www.Facebook.com/myUNDIES.

15 & 16 & 17. DENY. The fact that Registrant's Facebook page has images of Registrant's product is only indicative of the fact that Registrant is selling product as Registered with the USPTO. Registrant has had a Facebook page, presence and account nearly three years before Petitioner's claimed date of May 9, 2012.

18 & 19 & 20. DENY. As shown in #10 above, Registrant had a store on Facebook, but the company that provided the backend "shopping mall" technology sold itself to Intuit (see story above) and closed its business,

and all of its merchant stores, in March 2013. Rather than partner with another online shopping store service that may close, Registrant developed and built its own store that is available at www.MYUNDIES.org.

21-26. DENY. Again, Registrant is again “speculating” and has no facts. The fact that Registrant’s Twitter page has images of Registrant’s product and links to/from Registrant’s Facebook pages is only indicative of the fact that Registrant is selling product as Registered with the USPTO. More importantly, Registrant has had the stated www.twitter.com/MYUNDIES account long before May 2012. As just one example of EVIDENCE & FACT, here is a screengrab of a twitter email announcing a new “@myUNDIES” follower November 25, 2011.



27 & 28. DENY. At minimum, Petitioner is well-aware (as stated in the June 2012 filing) that the Registrant has had products for sale on a Facebook store prior to that store being closed in March 2013. And now the Registrant has rebuilt its own proprietary store that was opened a few weeks later and is available at www.MYUNDIES.org. **Again, despite a historically bad economic market, and a well-financed Venture Capitalist attempting to steal Registrant’s mark, the Registrant has never had three consecutive years of non-use and has NO intention of abandoning mark.**

29-31. DENY. Petitioner is again speculating without evidence. The Registrant has produced goods described in the MYUNDIES Registration and does have goods with “tags or labels affixed thereto” in

commerce. Goods are available for purchase and, as EVIDENCE and FACT here is a picture of inventory showing said goods with the Registered trademark “produced and affixed”.



Again, despite a historically bad economic market, and a well-financed Venture Capitalist attempting to steal Registrant's mark, the Registrant has never had three consecutive years of non-use.

ADDITIONAL FACTS/CLAIMS ABOUT PETITIONER

1. Petitioner's prior counsel failed to do the most basic necessary trademark research prior to the Petitioner using an identical infringing mark and attempting to trademark said infringing mark. Had counsel merely completed a simple “knock-out” search and typed in the word “undies” in the USPTO.gov TESS search engine, counsel would have found fewer than 100 trademarks and would have found the live MYUNDIES mark. At that time counsel would have seen that the Registrant's mark was a LIVE trademark and should have advised Petitioner to find another mark. Any qualified intellectual property attorney would do that basic trademark search and make that determination and advise client accordingly versus attempting to duplicate a live trademark. **Either the Petitioner's counsel failed to do the most basic necessary diligence required of an intellectual property attorney (ie., type in a few variations of a client's desired trademark name into the USPTO search engine and review the results) and falsely claimed otherwise under signed testimony (SEE PRIOR FILING FOR SIGNED TESTIMONY), or Petitioner's counsel unwisely and**

illegally advised client to purposely infringe on a LIVE registered trademark with just a single letter difference for an identical service. Either way, the USPTO correctly denied the Petitioner's trademark application. TWICE. USPTO should not reward obvious lack of diligence in filing a trademark application—especially when diligence is supposedly completed by a licensed intellectual property attorney—and should not allow well-financed parties to unduly burden and attempt to browbeat legal Trademark owners.

2. Additionally, the USPTO should not reward Petitioner's fraudulent tactics. Upon correctly being denied registration of its infringing mark by the USPTO, Petitioner's prior counsel had one of its employees (Noah Taubman) call the Registrant and fraudulently pretend to be a college student in order to attempt to gather more information. Petitioner's failure to acknowledge this information in counsel's signed testimony is further proof of bad faith and fraud by Petitioner and Petitioner's counsel. Besides the fact that having the Petitioner's employee contact Registrant under false pretenses is possible grounds for counsel's disbarment (breach of ethics), it proves that Registrant could be contacted and that Petitioner's counsel could and should have easily done the same had he done a basic trademark search prior to attempting to register an infringing trademark.

The fact that counsel never contacted Registrant except under false pretenses AFTER Petitioner's trademark application was denied, further proves lack of diligence.

3. The Petitioner failed to register an identical mark via USPTO as Registrant's LIVE legal trademark. The Venture Capital-financed Petitioner is therefore attempting any and all other methods to steal Registrants mark—from having employees fraudulently contact Registrant, to having counsel burden Registrant with attempt to cancel a LIVE trademark, to purposely and knowingly producing and selling products with an infringing mark, to unduly causing harm to owner of LIVE trademark with fabricated, false and “speculative” allegations—rather than focus on the basic fact that Petitioner is infringing on a LIVE trademark and that Petitioner has TWICE had its trademark application correctly denied by the USPTO. We therefore request that this fraudulent Cancellation petition be immediately DISMISSED.

4. The Petitioner does not deny that at the time of the first infringing mark application and the Petitioner's cancellation petition, that the Registrant's mark was less than 3 years old.

5. The Petitioner is causing significant harm to the Registrant's trademark and brand by advertising on pornographic websites thereby significantly tarnishing the Registrant's brand.



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Why One Advertiser is Betting on Porn

Jack Marshall 06.03.2013 [Follow @JackMarshall](#)

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For most mainstream advertisers, adult online content is to be avoided at all costs. But to others, it represents an opportunity to reach vast, relatively untapped audiences, often for a fraction of the cost of their regular media buys.

Startup underwear brand and retailer MeUndies, for example, has no problem aligning itself with risque online content. This week, it's launching a display ad campaign with pornographic publisher PaintBottle.com to promote its sock ranges. Customized MeUndies ads will run alongside video content on the PaintBottle site, all of which is adult in its nature.

In Summary, the Registrant again requests an immediate dismissal of the Petitioner's cancellation proceedings post haste. Petitioner failed to do the most basic due diligence prior to adopting an infringing mark and was rightfully rejected by the USPTO. Therefore all subsequent efforts by Petitioner to obtain said mark should also be rejected. Furthermore, Petitioner has failed to make a valid claim as the registered mark is not abandoned and is legally owned by the Registrant and proven to be in use and has no intention of abandoning the mark. Petitioner has failed to set forth any facts that, as legally required, show at least three consecutive years of non-use. Petitioner's amended petition lacks facts and is based on "beliefs" that fail to rise above the speculative level, thus the petition to cancel is not legally sufficient and should be immediately dismissed.

Again, Petitioner is attempting all efforts to fraudulently obtain Registrant's rightful and legally owned mark. Petitioner is using significant financial resources to attempt to intimidate and overwhelm rightful Registrant's ownership and use of said mark, while at the same time ignoring intellectual property rights by selling goods with an infringing label. Petitioner's original counsel failed to complete a basic trademark search prior to attempting to register infringing mark. Rather than simply changing its brand name, Petitioner is purposely creating confusion and causing harm to legally owned registrant by the continued use of a similar mark and is now causing further harm to Registrant by making false allegations and causing duress on Registrant by filing a fraudulent cancellation petition and by associating the mark with pornography. Registrant requests that the USPTO not unduly burden Registrant with another 12-18 months of discovery and trial for an unfounded (yet well-financed) cancellation petition. Petitioner's cancellation request is lacking a valid abandonment claim and is based on fraud and should be dismissed immediately.

In closing, the USPTO denied the Petitioners attempted infringing trademark application based on unmistakable likelihood of confusion (just ONE letter difference in the name while selling identical goods). Please do not now allow the Petitioner to abuse the trademark process by fraudulently attempting to cancel a Registrant's legal trademark. Please do not allow the Petitioner to unduly burden Registrant with 12-18 months of legal expenses. **As the USPTO attorney who denied the Petitioner's attempted infringing trademark succinctly said best:**

"It appears that you are being bullied by a party whose TM rights are junior to yours.

I sincerely hope you prevail."

Based on these facts, and the facts previously submitted, the Registrant again requests immediate dismissal of the Petitioner's cancellation proceeding post haste. Please do not let baseless claims waste the resources of the USPTO and law abiding legal trademark owners.

Thank you in advance for your consideration and action to immediately dismiss the cancellation petition.

Respectfully submitted,

By: /Drew Massey/

Drew Massey
dba myUNDIES Inc.
MYUNDIES Trademark Registrant
3387 Xanthia Street
Denver, CO 80238

Date: June 26, 2013

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of this paper has been served upon petitioners legal counsel via
USPS at address below provided on this date.

John Crittenden
Cooley LLP
777 6th Street NW
Washington, DC 20001

Signature: /Drew Massey/

Name: Drew Massey

Date: 6/26/13